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92-1088

Supreme Court, U.S.
FILED
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Roberta McLaren,
Petitioner,

V.

Imperial Casualty & Indemnity Co.
and Special Risks, Inc.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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APPENDIX

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 91-1254

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ROBERTA McLAREN,

Plaintiff-Appellant,

VERSUS

IMPERIAL CASUALTY & INDEMNITY CO. and SPECIAL RISKS, INC.,

Defendants-Appellees.

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Appeal from the United States District Court for the Northern District of Texas
(CA4-90-460-A)

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(April 9, 1992)

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

PER CURIAM*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has

Plaintiff-Appellant Roberta McLaren--paradoxically both the assignee of a police officer insured under a law enforcement insurance policy issued by Defendant-Appellee Imperial Casualty & Indemnity Company, and the victim of the insured officer's admittedly wrongful acts--appeals the district court's holding that the policy does not cover such acts of the insured against McLaren. Finding the insurance policy ambiguous, we construe the policy against the insurer and reverse.

I.

FACTS

On the night of April 22, 1985, after having dinner and drinks with friends at a restaurant in Hurst, Texas,

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determined that this opinion should not be published.

McLaren was driving on a freeway in Bedford, Texas, on her way home to Euless, Texas, when she observed flashing police lights in her rear-view mirror. She pulled her car over and stopped on the side of the road. Larry Taylor, a uniformed Bedford police officer, got out of the squad car and approached McLaren's car. He asked her to step out of her car, informing her that he had stopped her for "riding the white line." After inspecting McLaren's drivers license, Officer Taylor administered a field sobriety test, which McLaren passed. Officer Taylor then issued McLaren a citation for not having proof of liability insurance and instructed McLaren to follow him in her car.

McLaren, who thought that she had been arrested and was being led to the

police station, dutifully followed Taylor. Instead of continuing to the station, however, Officer Taylor turned into an empty parking lot in a deserted area. Officer Taylor remained in his squad car, with the lights flashing and the police radio functioning, and instructed McLaren to get out of her car and into the front seat of the squad car. When she complied, Taylor ordered McLaren to disrobe partially, complimented her physical attributes, and instructed her to perform fellatio. After the act was completed, Officer Taylor changed McLaren's citation, "whiting out" the proof of insurance charge and substituting a charge of driving without a license. Taylor informed McLaren that the new charge would be dismissed when she showed the judge her license. Taylor

allowed McLaren to get out of the squad car but told her to wait until he had left before leaving the parking lot. McLaren reported the incident later that night and the Bedford Police Department began an investigation. Ultimately, Taylor was dismissed from the police force and charged with the crime of sexual assault, to which he pled guilty.

The City of Bedford carried a "Law Enforcement Professional Liability Insurance" policy (the "policy") issued by Imperial Casualty & Indemnity Company ("Imperial"). Special Risks, Inc. ("Special Risks") served as the managing general agent for Imperial on that policy. Pursuant to the policy, Imperial promised, inter alia, to pay on behalf of the City of Bedford and its police officers all "damages for personal

injuries" caused by "wrongful acts arising out of the Law Enforcement activities." The policy defined a "wrongful act" as:

> Actual or alleged error, misstatement or misleading statement, omission, neglect or breach of duty by the Insured individual or collectively, while acting or failing to act within the scope of his employment or official duties pertaining to the law enforcement functions of the Insured (emphasis added).

The policy defined "personal injury" to include several acts, but provided that "no act shall be deemed to be or result in personal injury unless committed in the regular course of duty by the Insured."

McLaren filed suit against Taylor and the City of Bedford in Texas state court on April 22, 1987. Imperial denied coverage under the policy and refused to

defend Taylor. McLaren settled with the City and obtained a judgment against Taylor on June 26, 1989 for $7,018,045 after he failed to appear to contest the matter. In February 1990, Taylor assigned to McLaren any rights he might have against Imperial under the policy in exchange for a release from liability. On May 15, 1990, McLaren, as Taylor's assignee, filed suit in Texas state court against Imperial and Special Risks, seeking to recover the amount of the judgment against Taylor as well as damages resulting from Imperial's refusal to defend Taylor. The defendants removed that action to the federal district court. Each party moved for summary judgment; the district court granted the motions of Imperial and Special Risks but denied McLaren's motion. The district

court held as a matter of law that (1) the policy did not cover Taylor's conduct; (2) Imperial owed no duty to defend Taylor for such conduct; (3) Taylor suffered no damage as a result of Imperial's refusal to defend; and (4) all of McLaren's claims other than recovery from Imperial under the policy were barred by a two-year statute of limitations. McLaren appeals the district court's judgment on several grounds, attacking primarily the holding that the policy did not cover Taylor's conduct.

II.

ANALYSIS

This court reviews the grant of summary judgment de novo, using the same criteria as the district court and reviewing all facts and inferences to be

drawn therefrom in the light most favorable to the nonmoving party.[1]

A. Coverage under the policy for Officer Taylor's acts

The district court, and the parties in their arguments, relied on cases discussing the doctrine of respondeat superior in determining whether Officer Taylor's actions against McLaren were covered by the policy. Although we recognize the similarity between the "scope of employment" and "arising out of Law Enforcement activities" language of the policy on the one hand, and the test for determining whether an employer is vicariously liable for the actions of his employee in tort cases on the other, we emphasize at the outset that this is not

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[1] LeJeune v. Shell Oil Co., 950 F.2d 267, 268 (5th Cir. 1992).

a tort case to which the doctrine of respondeat superior applies. Neither is it a civil rights case for infliction of a constitutional tort cognizable under 42 U.S.C. § 1983. Rather, this case turns strictly on the proper interpretation of an insurance contract. Consequently, cases discussing "course and scope of employment" in the context of respondeat superior have only instructional value. The same is true for excessive force cases under § 1983.

Preliminarily, there are two possible approaches to analyzing Officer Taylor's actions under the language of the subject insurance policy. The narro w approach would focus solely on the act of which McLaren complains--that of Officer Taylor in forcing her to perform fellatio. The broad approach would

consider that act in the context of an entire, uninterrupted series of acts that began when Taylor stopped McLaren for apparently driving while intoxicated, and ended when Taylor got off duty at the end of his watch. We find the first approach to be prohibitively narrow. Clearly, forcing someone to perform fellatio is both an intentional tort and a crime, and in the abstract sense can never fall within a policeman's scope of employment or official law enforcement duties. But in this case we cannot examine that act in a vacuum; rather, we must put it in its proper context by considering the unbroken flow of circumstances and event s occurring before, during, and after the commission of that act.

When Officer Taylor stopped McLaren on the freeway, he was on duty, dressed

in full uniform, armed, and driving a clearly identifiable police squad car. Consistent with his authority as a polic e officer and the functions for which he was on duty at the time, he administered a field sobriety test to McLaren, asked her to produce proof of liability insurance, and issued a citation when she could not produce such proof. Taylor's instruction to McLaren to follow him in her car was not inconsistent with traffic arrest procedures, and McLaren was reasonable in believing that she was being led to the station for booking and was thus obeying a lawful order. Likewise, Taylor's order, issued after arriving at the parking lot, for McLaren to leave her car and enter the squad car, was not inconsistent with traffic arrest procedures and, again, she was reasonable

in complying, still believing that she was in his custody and not free to disobey his orders. Most significantly to the instant analysis, during the time between McLaren's entry of the squad car until Taylor drove away, he never turned off the squad car's flashing lights or radio and never reported to his dispatcher that he was temporarily off duty or out of communication. Our point is that even during the illicit sex act Taylor was simultaneously on duty--he never stopped his "law enforcement activities." Even before McLaren got out of the squad car, Taylor acted in his official capacity by changing McLaren's citation and instructing her as to the proper manner of settling it. Throughout the entire series of events, Officer Taylor acted with either actual or

apparent authority. McLaren reasonably believed that she was required to comply with his orders--and even her obedience to Taylor's illicit orders resulted from duress, intimidation and fear of the accoutrements of police authority, including Taylor's service weapon which, stated McLaren, he repeatedly touched as if to emphasize its presence.

We recognize that generally there are two distinct situations in which a police officer can act outside the scope of his authority. One is by exceeding the reasonable limits of an authorized act or function; the other is by turning aside to do a clearly unrelated act. Examples of the first situation are found in cases involving the use of force. An officer is authorized to use force in certain circumstances, such as making

arrest or quelling disturbances, but the degree of force that an officer may use in those circumstances is limited, and an officer exceeds his authority when he exceeds those limits. The other situation is seen in the example of an officer who clearly stops performing his official duties and goes off on an uncomprehended personal lark, such as when an officer signs off the air, takes off his tie and tunic, goes into a bar for a few belts, and ends up in a brawl that results in personal injuries and property damage.

But the facts of the instant case do not fall into either situation. Taylor neither performed a lawful act to excess nor went off duty even temporarily. His misconduct occurred contemporaneously with the continuous performance of his

law enforcement duties. The question presented in the instant case is not whether the insurance policy covers only the first type of unauthorized conduct (negligently or intentionally exceeding the limits of authorized conduct) and excludes personal larks by police officers, or covers even those unauthorized activities that are merely brief and unexpected deviations from a continuing course of action which is otherwise wholly consistent with law enforcement authority. The question here is whether the subject insurance policy covers an obviously unauthorized and illegal act that is unquestionably a breach of the officer's duty but which occurs, as here, simultaneously with and during the uninterrupted course of his regular duty.

To answer that question, we must begin with an analysis of the language of the policy. By its terms, the policy covers "wrongful acts arising out of Law Enforcement activities." The policy defines such wrongful acts as actions committed by an officer "within the scope of his employment or official duties pertaining to [his] law enforcement functions." To qualify for coverage, the injury must be caused by the actions of an insured "committed in the regular course of duty."

Under Texas law, a contract is ambiguous if it is reasonably susceptibl e to more than one meaning after applying established rules of construction.[2] One reasonable reading of the policy in this

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[2] Richland Plantation Co. v. Justiss-Mears Oil Co., 671 F.2d 154, 156 (5th Cir. 1982).

case--and possibly even the best reading--is that a forced sexual act such as that committed by Officer Taylor in and of itself is not within the scope of his employment or official duties. It is axiomatic that the duties of a law enforcement officer never include sexual favors obtained by force, duress, coercion, trickery or the like.

But that is not the only reasonable reading of the policy. It is also reasonable to read the policy to protect the insureds from liability for damages resulting from such an act when, as here, it is committed simultaneously with and during the offending officer's unbroken series of acts all of which are performed in the regular course of his duty. As noted, Taylor never stopped performing his regular "on call" patrol duties. His

radio was never off; he never "signed off;" he never left his squad car; he was never even out of uniform. A reasonable alternative reading of the wording of the policy is that the incident arose out of Taylor's law enforcement activities and that he committed that act in the regular course of duty, which continued without interruption throughout the short, sordi d affair. In fact, but for the exercise of his duty, Officer Taylor would not have been in a position to commit the offense against Ms. McLaren, so that a reasonable interpretation is that the offense against McLaren undeniably arose out of law enforcement activities. Although the policy covers only personal injury "committed in the regular course of duty of the insured," that too is susceptible of a temporal reading; and as

we have noted, the act occurred at a time when Taylor was on duty, i.e., during his regular course of duty.

As we find the wording of the polic y susceptible of at least two reasonable interpretations, we conclude that the policy is ambiguous. Texas law is well-settled that when an insurance policy is ambiguous, it is to be construed strictly against the insurer and liberally in favor of the insured.[3] Following that rule, we hold that the policy covers the offending acts committed by Officer Taylor that caused that damages suffered by McLaren. Therefore, in our plenary review, we disagree with the district court's grant of Imperial's motion for summary judgment and denial of that filed

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[3]Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663, 666 (Tex. 1987).

by McLaren. We hold that Imperial's motion for summary judgment must be denied and McLaren's must be granted.

B. Duty to defend

In her motion for summary judgment, McLaren asserted that Imperial and Special Risks had breached their duty to defend Taylor in McLaren's state court suit against him for damages. The polic y provided that Imperial would defend "any claim or suit against the insured seeking damages on account of such wrongful acts, even if the allegations of the claim or suit are groundless, false or fraudulent . . . ." The district court denied McLaren's motion and granted Imperial's and Special Risks' motions for summary judgment on this issue. In so doing, the district court held that Imperial and Special Risks had no duty to

defend Taylor because the conduct alleged by McLaren against Taylor was not within the coverage of the policy as a matter of law. As an alternative ground, the district court held that McLaren had failed to raise any material fact issue that Taylor had been damaged by Imperial's and Special Risks' refusal to defend. Because Taylor's alleged conduct was not covered by the policy, the court held, the only possible damage resulting from the failure to defend would have been any legal expenses that Taylor had incurred in defending the suit. And, as Taylor did not attempt to defend the suit, there was no evidence of any such damages.

With respect to Imperial, our holding that the policy covered Officer Taylor's actions renders those issues

moot. Were we to hold that Imperial had a duty to defend Taylor and breached that duty, and that its breach caused Taylor to suffer a judgment, McLaren still would be entitled to recover only the limit of the coverage under the policy. As she is entitled to recover that amount by virtu e of our holding today, we need not and do not address the issue of Imperial's failure to defend.

McLaren has produced no summary judgment proof sufficient to raise a question of fact regarding the existence of an obligation by Special Risks, under the policy or otherwise, to defend Officer Taylor against McLaren's claims. Thus, the district court did not err in granting Special Risks' motion for summary judgment on that issue.

C. Statute of limitations

In addition to the claims discussed above, McLaren brought claims against Imperial and Special Risks for (1) breach of a duty of good faith and fair dealing; (2) false, misleading and deceptive acts and practices under the Texas Deceptive Trade Practices-Consumer Protection Act; and (3) violations of Tex. Ins. Code art. 21.21 (collectively, the "bad faith" claims). In their motions for summary judgment, Imperial and Special Risks argued that applicable statutes of limitations barred all of McLaren's claims. The district court held that it need not discuss that argument because summary judgment was proper on other grounds, but that, if limitations had been the sole ground for the defendants' motions for summary judgment, all of McLaren's claims other than her claim

against Imperial for payment under the policy would have been barred by limitations. We agree.

McLaren filed her state court suit against Taylor on April 22, 1987. On July 15, 1987, Imperial notified Taylor in writing that it was denying coverage and that it would not defend Taylor. The state court rendered judgment against Taylor on June 26, 1989. McLaren filed the instant action on may 15, 1990. All parties concede that McLaren's claim for payment under the policy is governed by a four-year statute of limitations and thus is not time-barred. McLaren argues that the same four-year limitations period controls her claims against Imperial and Special Risks for failure to defend Taylor. As we hold that claim to be moot, we do not address this contention.

McLaren concedes that her bad faith claims have limitations periods of only two years. She argues, however, that she brought those causes of actions timely because they did not accrue until the state court rendered judgment against Taylor on June 26, 1989. McLaren asserts that this action is a Stowers[4] third party action, and that, in such a case, the injury-producing event which starts the running of the limitations period is the rendering of a judgment in excess of the policy limits.

We disagree with McLaren's classification of this action. In Murray v. San Jacinto Agency, Inc.,[5] an

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[4]G.A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved).

[5]800 S.W.2d 826 (Tex. 1990).

insurance company initially denied coverage, then changed its position six months later and admitted coverage. The insured brought suit against the insurance company, alleging negligent denial of coverage and a breach of the duty of good faith and fair dealing. The suit was filed and citation was served more than two years after the initial denial of coverage, but less than two years after the admission of coverage. The Texas Supreme Court held that the insured's cause of action accrued and limitations began to run not on the date that the insurance company subsequently admitted coverage but when the company wrongfully denied coverage, as that was when the wrongful act effected an injury.[6] The court noted that "a cause

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[6] Id. at 828.

of action generally accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy." The court distinguished between third party Stowers cases and first party cases:

> The injury producing event in a Stowers third party case is not the same as it is in a first party case. A Stowers third party claim accrues when the insurer unreasonably fails to settle a claim against the insured within policy limits. The injury producing event is the underlying judgment in excess of policy limits. A first party claim, such as . . . this case, accrues when an insurer unreasonably fails to pay an insured under the policy. The injury producing event is the denial of coverage. Limitations on a first party claim appropriately begins to run at denial, not the date a separate suit to determine coverage under the contract is resolved.[7]

The instant case, like Murray, is a first

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[7] Id. at 829 (citations omitted).

party case. McLaren brought this action as Taylor's assignee, so her cause of action was governed by the limitations period applicable to Taylor. Taylor suffered an injury and could have sought a judicial remedy when Imperial wrongfully denied coverage on July 15, 1987. Thus, limitations began to run on that date and, as McLaren brought the instant action more than two years later , her bad faith claims are barred.

III.

CONCLUSION

Finding the insurance policy ambiguous, we must construe it strictly against Imperial and find coverage of Officer Taylor's wrongful acts. We therefore REVERSE the district court's grant of summary judgment in favor of Imperial and its denial of McLaren's

motion for summary judgment against Imperial; RENDER summary judgment in favor of McLaren against Imperial to the full extent of its policy limits and related provisions; and REMAND to the district court for the sole purpose of determining the specific amount of the judgment against Imperial and in favor of McLaren, including interest and costs, if any. In all other respects, however, we AFFIRM the judgment of the district court.

E. GRADY JOLLY, Circuit Judge, dissenting in part:

I respectfully dissent. The majority bases its reversal on an "ambiguity" in the policy. There is no ambiguity: the majority simply fails to read and apply all of the policy's terms consistent with their ordinary usage.

There is but one reasonable and common sense interpretation of this policy: Rape by a policeman is not an act done within the scope of his employment, nor done within the scope of an official duty, nor done in the regular course of a policeman's duty. Indeed, I do not know how the policy could be clearer in its language to exclude an intentional tort and crime committed for the sole purpose of the employee's personal gratification. Because coverage clearly does not extend to Taylor's acts, I would affirm the district court's judgment.

The majority admits that "forcing someone to perform fellatio is both an intentional tort and a crime" "and in the abstract sense can never fall within a policeman's scope of employment or

official law enforcement duties."[1] Slip op. at 6. But the majority poses the question in this case as "whether the subject insurance policy covers an obviously unauthorized and illegal act that is unquestionably a breach of the officer's duty but which occurs, as here, simultaneously with and during the uninterrupted course of his regular duty."[2] Answering "yes," the majority's theory is simply this: Because "but for the exercise of his duty, [Taylor] would

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[1]In the "abstract" sense, indeed! In the realistic sense, fellatio could never "fall within a policeman's scope of employment or official law enforcement duties."

[2]It is impossible to accept the factual premise of the question posed unless one can believe that it was part of Taylor's "regular duty" to deceive McLaren into following him to the vacant parking lot and engaging in rape; otherwise, his "regular duty was interrupted when he set out on his plan to engage in rape.

not have been in a position to commit the offense," that rape "arose out of Taylor's law enforcement activities" and because he raped McLaren during the time he was on duty, "he committed that act in the regular course of duty which continued without interruption throughout the short, sordid affair." Slip op. at 10. To say this requires the same kind of mind stretch that is required to conclude that an on-duty security officer who robs a bank at gunpoint is acting in the regular course of his duty because he never turned off his radio, took off his "tunic and tie," nor officially signed off the clock for the interim of the robbery. "His misconduct occurred contemporaneously with the continuous performance of his law enforcement duties." Slip op. at 8. Applying the

majority's reasoning, one must conclude that such a bank robbery "arose from the law enforcement activities" because "but for" those activities, the security officer would not have been on the premises, nor have had the gun, nor have been able generally to employ the modus operandi of the robbery. This kind of word play, indulged in by the majority without citation of authority whatsoever, is best left for the postulations of a college semantics or rhetoric class and should be eschewed by a court of law.

The majority would have been better served by a straightforward application of the policy's terms in keeping with their ordinary meaning. Imperial's policy specifically covers "all sums which the Insured shall become legally obligated to pay as damages because of

wrongful acts arising out of Law Enforcement activities." [Emphasis mine.] The policy defines "wrongful act" to mean "only or all of the following: Actual or alleged error, misstatement or misleading statement, omission, neglect or breach of duty by the Insured individual or collectively, while acting or failing to act within the scope of his employment or official duties pertaining to the law enforcement functions of the Insured." [Emphasis mine.] In defining "personal injury," the policy states that "no act shall be deemed to be or result in personal injury unless committed in the regular course of duty by the insured." "Insured" is defined to include "all paid full or part time employees." Transposing these words to the facts of this case results in

coverage as follows:

> The insurance company will pay all sums which Taylor shall become legally obligated to pay as damages, caused in the regular course of Taylor's duty by Taylor's acts, which are within the scope of his employment or within his official duties, if such employment and duties pertain to the law enforcement functions of the city of Bedford, Texas, and if Taylor's acts arise out of Law Enforcement activities.

Instead of considering the policy language in its entirety to determine coverage, the majority picks and chooses, focusing primarily on the phrase "committed in the regular course of duty," with support from the phrase, "arising out of law enforcement activities." However, although the damages must be caused "in (not during) the regular course of duty," and must "arise from law enforcement activities,"

the policy clearly states that Taylor is covered only for acts that, additionally,: 1) are within the scope of his employment, or his official duty and 2) pertain to law enforcement functions.

The majority's failure to take into account the entirety of the coverage language is understandable: it could not possibly conclude that Taylor's acts were within the scope of law enforcement employment or within official police duties. The majority, in fact, acknowledges: "It is axiomatic that the duties of a law enforcement officer never include sexual favors obtained by force, duress, coercion, trickery or the like." Slip op. at 9. Yet the majority blithely ignores this axiom by finding McLaren's injury "qualif[ied] for coverage" because

it "was caused by the actions of an insured 'committed in the regular course of duty.'" Slip op. at 9. The policy wording, "committed in the regular course of duty," cannot be fairly interpreted to be read synonymously with during the regular course of duty; "in" refers to place, as "within" the perimeter of a policeman's duties; "during" refers to time, as "while" on duty. Hence, the policy phrase clearly cannot be given the "temporal" meaning (slip op. at 10) the majority attaches to it.

To reiterate: the phrase "regular course of duty," moreover, is not the sole wording determining coverage: coverage exists only when acts are also "in the scope of . . . employment or official duties." Of course, no one--not even the majority--contends that rape is

"in the scope of . . . employment or official duties." Neither did the rape "pertain[] to the law enforcement functions" of Taylor or the city of Bedford. To quote the majority again: "It is axiomatic that the duties of a law enforcement officer never include sexual favors obtained by force, duress, coercion, trickery or the like." Slip op. at 9. Although this "law enforcemen t function" requirement, as well as the "scope of employment" and "official duties" requirements, are ignored by the majority, each of these requirements for coverage was written into the policy and none of them was met.

Finally, the majority errs in a major way in reasoning that because Taylor would not have been in a position to commit this assault "but for" the fact

that he was a policeman, McLaren's rape "arose from" law enforcement activities. Completely transforming the "arising from" language into the much broader and more attenuated "but for" causation analysis is done without citation of authority. Such a construction of the policy is a plain distortion of its terms.

Apart from failing to apply the plain terms of the policy, the majority further errs when it dismisses "cases discussing 'course and scope of employment' in the context of respondeat superior" and "excessive force cases under § 1983" as having "only instructional value." In all but closing its eyes to these cases, the majority thus tries to avoid the ultimate question of how a planned rape, serving only the

officer's personal gratification, is within the scope of his employment or "official duty." The majority, hanging onto the "in the course of regular duty" phrase, can only respond: "Well, because of the time the rape occurred--a time when the officer was on the clock and a time right after he had performed an official duty, i.e., a traffic citation." No authority for this ill-considered reasoning is cited. Consequently, it seems to me that in view of the fact that the policy extends coverage only to acts "within the scope of [Taylor's] employment or official duties," such cases have not only "instructional value " but that when they are from our Circuit, they are persuasive precedent. See, e.g., City of Green Cove Springs v. Donaldson, 348 F.2d 197, 202 (5th Cir.

1965) (applying Florida law, court held that uniformed officer's rape of woman after traffic stop was outside scope of employment). Moreover, Texas courts hold that:

> To be within the scope of employment 'the conduct must be of the same general nature as that authorized or incidental to the conduct authorized. [Citation omitted] . . . . [W]here the act of the servant is not in the furtherance of the master's business, or for the accomplishment of the object for which he was employed, but is performed . . . in the furtherance of personal animosities of the servant, the master is not liable.

Smith v. M Systems Food Stores, 156 Tex. 484, 297 S.W.2d 112, 114 (1957). Imperial's policy extends no coverage to an act outside Taylor's scope of employment. Thus, our determination in this case should be bound by Smith v. M Systems, which gives an authoritative

definition to the so-called "ambiguous" terms of the coverage.

In closing, I turn to address one final point: The majority holds that McLaren is entitled to recover "the limit of coverage under the policy." After Imperial denied coverage, Taylor made no effort to defend himself and, without protest, allowed a $7 million default judgment to be taken against him. McLaren then released him from all liability to her in return for an assignment to her of his rights under the policy. The arrangement between Taylor and McLaren has an appearance of collusion. This Court should not sanction an appearance of such impropriety. At the least, we should require that McLaren prove her damages before she collects. In this case, there

was no judicial determination for the underlying facts and damages involved in McLaren's claim against Taylor; Taylor simply defaulted and then assigned his rights as an insured to McLaren. To hold Imperial to a "determination" which, in reality, was not a determination at all, but simply a demand by an adversary, does not even mimic fairness.

In closing, let me say that I can well understand the majority's sympathy for Ms. McLaren. She has indeed been done a terrible, terrible wrong. But it was a detestable crime perpetrated by Taylor solely and only in his personal interests. It was an act plainly not covered under this insurance policy. This defendant is not liable and we should not say it is. One wrong is enough.

I respectfully dissent.[3]

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[3]As should be clear, my dissent is limited to Part II A of the majority's opinion. I concur in the remainder thereof.

**APPENDIX B**

**UNITED STATES COURT OF APPEALs**
For the Fifth Circuit

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No. 91-1254

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ROBERTA McLAREN,

Plaintiff-Appellant,

VERSUS

IMPERIAL CASUALTY & INDEMNITY CO.
and SPECIAL RISKS, INC.,
Defendants-Appellees.

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Appeal from the United States District Court For the Northern District of Texas
(CA4-90-460-A)

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ON PETITION FOR REHEARING AND
SUGGESTION FOR HEARING EN BANC

Before GOLDBERG, JOLLY and WEINER, Circuit Judges.

PER CURIAM*

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We withdrew our previous opinion, McLaren v. Imperial Casualty & Indemnity Co., No. 91-1254 (5th Cir. April 9, 1992), and substitute the following opinion therefor.

Plaintiff-Appellant Roberta McLaren--paradoxically both the assignee of a police officer insured under a law enforcement insurance policy issued by Defendant-Appellee Imperial Casualty & Indemnity Company, and the victim of the insured officer's admittedly wrongful acts--appeals the district court's holding that the policy does not cover such acts of the insured against McLaren. Upon revisiting this issue on rehearing to scrutinize more closely the Texas law of contract interpretation, we find that

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be published.

the district court correctly interpreted the insurance policy and therefore affirm.

## I.

## FACTS AND PROCEEDINGS

### A. Facts

The operative facts of this case are set forth in detail in our opinion on initial hearing and are incorporated herein by reference. They do not, therefore, bear repeating in such an extensive form here, so we state the facts in an abbreviated form only.

McLaren was driving on a freeway in Bedford, Texas, around midnight when she was pulled over by Larry Taylor, a uniformed Bedford police officer. After inspecting McLaren's drivers license, Officer Taylor administered a field sobriety test, which McLaren passed.

Taylor then issued McLaren a citation for not having proof of liability insurance. He then instructed Mclaren to follow him in her car, which she did. Instead of proceeding to the police station, however, Officer Taylor turned into an empty parking lot in a deserted area. He remained in uniform in his squad car, with the lights flashing and the police radio functioning, and instructed McLaren to get out of her car and into the front seat of the squad car. When she complied, Taylor ordered McLaren to disrobe partially and then to perform fellatio.

McLaren reported the incident later that night. After the Bedford Police Department investigated the incident, Taylor was dismissed from the police force and charged with the crime of

sexual assault, to which he pled guilty.

The City of Bedford carried a "Law Enforcement Professional Liability Insurance" policy (the "policy") issued by Imperial Casualty & Indemnity Company ("Imperial"). Special Risks, Inc. ("Special Risks") served as the managing general agent for Imperial on that policy. pursuant to the policy, Imperial promised, inter alia, to pay on behalf of the City of Bedford and its police officers all "damages for personal injuries" caused by "wrongful acts arising out of Law Enforcement activities." The policy defined a "wrongful act" as:

> Actual or alleged error, misstatement or misleading statement, omission, neglect or breach of duty by the Insured individual or collectively, while acting or failing to act within the scope of his employment or official duties

> pertaining to the law enforcement functions of the Insured (emphasis added).

The policy defined "personal injury" to include several acts, including assault and battery, but provided that "no act shall be deemed to be or result in personal injury unless committed in the regular course of duty by the Insured."

B. Proceedings

McLaren filed suit against Taylor and the city of Bedford in Texas state court. Imperial denied coverage under the policy and refused to defend Taylor. McLaren settled with the City, then obtained a $7,018,045 judgment against Taylor after he failed to appear to contest the matter. Over six months later, Taylor assigned to McLaren any policy rights he might have against Imperial in exchange for a release from

liability under McLaren's judgment. Thereafter, McLaren, as Taylor's assignee, filed suit in Texas state court against Imperial and Special Risks, seeking to recover the amount of her judgment against Taylor as well as damages resulting from Imperial's refusal to defend Taylor. The defendants removed that action to the federal district court. Each party moved for summary judgment; the district court granted the motions of Imperial and Special Risks and denied McLaren's motion. The district court held as a matter of law that (1) the policy did not cover Taylor's conduct; (2) Imperial owed no duty to defend Taylor for such conduct; alternatively, (3) Taylor suffered no damage as a result of Imperial's refusal to defend; and (4) all of McLaren's

claims other than recovery from Imperial under the policy were barred by a two-year statute of limitations. McLaren appeals the district court's judgment on several grounds, attacking primarily the holding that the policy did not cover Taylor's conduct.

II.

ANALYSIS

A. Standard of Review

This court reviews the grant of summary judgment de novo, using the same criteria as the district court and viewing all facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party.[1]

B. Coverage under the policy for Officer Taylor's acts

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[1] LeJeune v. Shell Oil Co., 950 F.2d 267, 268 (5th Cir. 1992).

On rehearing, we begin as we did originally with an analysis of the language of the policy. Key to any such analysis is vigilance for ambiguity, for in Texas as elsewhere ambiguous provision in insurance policies are construed against the insurer which drafts them.[2] By its terms, the instant policy covers "wrongful acts arising out of Law Enforcement activities." The policy defines such wrongful acts as actions committed by an officer "within the scope of his employment or official duties pertaining to [his] law enforcement functions." To qualify for coverage, the injury must be caused by the actions of an insured "committed in the regular course of duty."

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[2] See, e.g., Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663, 666 (Tex. 1987).

We remain convinced that, at least in the abstract, the policy language is ambiguous: it is susceptible of at least two interpretations. On the one hand, the language could mean that coverage is narrowly restricted to official law enforcement activities; on the other hand, the wording could be read more broadly as extending coverage to all acts that occur within an uninterrupted serie s of law enforcement activity.[3]

The dispute in this case centers on the ambiguous terms "within the scope of employment or official duties" and "in the regular course of duty." Where we went awry in our original opinion was in

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[3]Cf. Haight v. Savoy Apartments, 814 S.W.2d 849, 854 (Tex. App.--Houston [1st Dist.] 1991, writ denied) (recognizing question whether sexual assault arises within scope of employment, but declining to answer question).

stopping at the point of finding ambiguity and thus automatically construing the terms in question against the insurer. On reflection we are satisfied that we should have continued beyond the point of finding ambiguity vel non; we should have continued to follow Texas rules of construction, as we do now.

The policy does not define those central terms. Under Texas law, an undefined term in a contract of insurance must be given the meaning that ordinary persons in the position of the contracting parties would give to such term.[4] Terms in an insurance contract are "given their ordinary and generally accepted meaning unless the policy shows

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[4]See Security Mut. Casualty Co. v. Johnson, 584 S.W.2d 703, 704 (Tex. 1979).

the words were meant in a technical or different sense."[5] If a policy does not define a term but the term has a defined legal meaning, an ordinary person would conclude that the contract term in question encompasses the standard legal definition.[6] Therefore, despite the existence of ambiguities in the policy's wording, we cannot automatically construe the policy against the insurer when, as here, we find that the ambiguous wording does have a defined meaning in law.

The terms at issue in this case have

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[5] Id.

[6] See St. Paul Mercury Ins. Co. v. Tri-State Cattle Feeders, Inc., 628 S.W.2d 844, 847 (Tex. App.--Amarillo 1982, writ ref'd n.r.e.) (because the policy does not define "theft," the term is given the same meaning it has under the Texas criminal law); Standard Fire Ins. Co. v. Griggs, 567 S.W.2d 60, 63 (Tex. Civ. App.--Amarillo 1978, writ ref'd n.r.e.).

been clearly defined by Texas case law. Even though the instant case involves interpretation of language in an insurance policy and is neither a common law nor statutory tort case which implicates the doctrine of respondeat superior, the legal definition of terms found in the latter line of cases are not necessarily inapplicable to the former. In Smith v. M System Food Stores, Inc.,[7] the Texas Supreme Court stated that "[t]o be within the scope of employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized." Conduct is within the scope of employment only if the act is "in furtherance of the master's business, or for the

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[7]156 Tex. 484, 297 S.W.2d 112, 114 (1957).

accomplishment of the object for which [their servant] was employed."[8] Conduct is not within the scope of employment if the actor is merely furthering his own interest.[9]

Thus, there is no uncertainty in the meaning of "within the scope of employment" under Texas law. there is also no question whether Officer Taylor's action against McLaren fit the definition of that term. Clearly it did not. His acts were in no way either authorized by his employer or performed for the accomplishment of the object for which he was employed. Hence the district court did not err in holding as a matter of law that the policy did not provide coverage

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[8] Id.

[9] Rosales v. American Buslines, Inc., 598 S.W.2d 706, 708 (Tex. Civ. App.--El Paso 1980, writ ref'd n.r.e).

to Officer Taylor for his actions against McLaren.

In Smith, a respondeat superior case, a security guard lawfully arrested a shoplifter. A bystander made some remarks to the security guard in connection with the arrest, and the security guard responded by unlawfully arresting and striking the bystander. The supreme court held that the guard's misconduct was not within the scope of his employment. Although Smith is factually distinguishable from the instant case because here officer Taylor sexually assaulted the person who was the object of his lawful stop, his actions nevertheless did not come "within the scope of his employment" as that phrase is defined in Smith. Given the recognized definitions of the contested

terms, we never reach the rule of contractual construction that controlled our original opinion--that ambiguities in contracts are construed against the drafter of the instrument, particularly when the instrument is an insurance policy.

C. Duty to defend

In her motion for summary judgment, McLaren asserted that Imperial and Special Risks had breached their duty to defend Taylor in the state court damage suit that McLaren had brought against him. The policy provided that Imperial would defend "any claim or suit against the insured seeking damages on account of such wrongful acts, even if the allegations of the claim or suit are groundless, false or fraudulent . . . ." The district court denied McLaren's

motion and granted Imperial's and Special Risks' motions for summary judgment on this issue. In so doing, that court held that Imperial and Special Risks had no duty to defend Taylor because as a matter of law the conduct of Taylor alleged in McLaren's complaint was not within the coverage of the policy. As an alternative ground, the district court held that McLaren had failed to raise any material fact issue that Taylor had been damaged by Imperial's and Special Risks' refusal to defend. Because Taylor's alleged conduct was not covered by the policy, reasoned the court, the only damage which could possibly have resulted from the failure to defend would have been the legal expenses, if any, that Taylor had incurred in defending the suit. But, as there is no evidence that

Taylor ever attempted to defend the suit, the record is devoid of evidence of damages.

With respect to Imperial, McLaren argues that, under the "allegations of the complaint rule," established in Heyden Newport Chemical Corp. v. Southern General Insurance Co.,[10] Imperial had and breached a duty to defend Taylor against McLaren's claims. In Heyden, the Texas Supreme Court stated:

> We think that in determining the duty of a liability insurance company to defend a lawsuit the allegations of the complainant should be considered in the light of the policy provisions without reference to the truth or falsity of such allegations and without reference to what the parties know or believe the true facts to be, or without reference to a legal

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[10] 387 S.W.2d 22 (Tex. 1965).

determination thereof.[11]

McLaren argues that, regardless of whether the policy provided coverage for Officer Taylor's acts, the allegations in her damage suit were sufficient to invoke Imperial's duty to defend under Heyden. We disagree.

There is a distinction between cases in which an insurer seeks to avoid a duty to defend on the ground that, although the alleged conduct by the insured is covered by the policy, the insured is not liable in the underlying suit, and cases in which the insurer seeks to avoid a duty to defend on the ground that the alleged conduct is not covered by the policy. Heyden involved the former situation. In Heyden, the insurance company denied coverage and refused to

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[11] Id. at 24.

defend the insured on the sole ground that it was not liable because the negligent wrongdoer was not the agent of the insured. The insurance company made no argument that the actions of the wrongdoer, if he was an agent of the insured, were not covered by the policy.

The latter situation is illustrated by Argonaut Southwest Insurance Co. v. Maupin.[12] In that case, the insurance policy covered damages the insured becam e legally obligated to pay because of the injury to property caused by "accident" or other "condition for which the insured is responsible . . . which was not intended." The Texas Supreme Court examined the complaint filed against the insured and determined that the complaint alleged that the insured had committed an

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[12]500 S.W.2d 633 (Tex. 1973).

intentional tort. As the policy did not cover intentional torts, the court held, the insurance company had no duty to defend the insured.[13]

The instant case falls in the same category as Maupin. Even when we apply the "allegations of the complaint rule," we find that Imperial had no duty to defend. As already noted, the policy covers "wrongful acts arising out of Law Enforcement activities." The policy set forth Imperial's duty to defend as follows:

> [T]he Company shall have the right and duty to defend any claim or suit against the Insured seeking damages on account of such wrongful acts, even if the allegations of the claim or suit are groundless, false or fraudulent . . . . (emphasis added)

Thus, Imperial had a duty to defend only

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[13]Id. at 636.

actions against Taylor "seeking damages on account of" "wrongful acts arising out of Law Enforcement activities." McLaren's complaint alleged acts which, as we now hold, did not come within the coverage of the policy. Imperial therefore had no duty to defend Taylor, so the district court did not err in granting Imperial's motion for summary judgment on that issue.

As to Special Risks, McLaren had produced no summary judgment proof sufficient to raise a question of fact regarding the existence of an obligation of Special Risks, under the policy or otherwise, to defend Officer Taylor against McLaren's claims. Thus, the district court did not err in granting Special Risks' motion for summary judgment on that issue.

D. Statute of limitations

In addition to the claims discussed above, McLaren brought claims against Imperial and Special Risks for (1) breac h of a duty of good faith and fair dealing; (2) false, misleading and deceptive acts and practices under the Texas Deceptive Trade Practices-Consumer Protection Act; and (3) violations of Tex. Ins. Code art. 21.21 (collectively, the "bad faith" claims). In our original panel opinion we analyzed the holding of the district court, and the reasons therefor: that it need not discuss that argument because summary judgment was proper on other grounds, but that, if limitations had been the sole ground for the defendants' motions for summary judgment, all of McLaren's claims other than her claim against Imperial for

payment under the policy would have been barred by limitations. Our original treatment of the issues of time bar is unchanged by our action here of reversing our original position and affirming the district court in all respects. Therefore, we do not reiterate but incorporate by reference the discussion set forth in "Section C. Statute of Limitations," in our original opinion. The only difference is the one regarding McLaren's assertion that her claim for failure to defend comes under a four year limitation period and thus is not barred. In our original opinion we did not address that point because we held that her claim was moot. On rehearing we do not address that point because we are now holding on the merits that neither Imperial nor Special Risks had a duty to

defend Taylor. Consequently we do not reach the issue of a time bar on McLaren's claim of a duty to defend.

E. Taylor's assignment of rights to McLaren

In its petition for rehearing, Imperial also challenges our decision to render judgment in favor of McLaren to the full extent of the policy limits. Because we now affirm the district court's summary judgment in favor of Imperial, we need not address that issue. We note, however, that there are at least hints of collusion and impropriety in Taylor's failure to contest McLaren's damage suit which resulted in a judgment against him in excess of $7,000,000, and his subsequent assignment to McLaren of his rights against Imperial under the policy. As we held above, Imperial

rightfully refused to defend Taylor against McLaren's claim. But even if Imperial's refusal had been wrongful, Taylor had a duty to defend himself reasonably in the damage suit in order to minimize his own and Imperial's potential legal liability.[14] As Taylor appears to have disregarded that duty, Imperial might not have been liable to the full extent of the policy limits even if we had left intact our original opinion on liability under the policy. As such, a remand might have been in order, even though it would have been limited to issues of quantum.

## III.

## CONCLUSION

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[14] See Laster v. American Nat'l Fire Ins. Co., No. 91-7234 (5th Cir. 1992); Britt v. Cambridge Mut. Fire Ins. Co., 717 S.W.2d 476, 480-83 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.).

Because Officer Taylor's wrongful acts were not committed in the scope of his employment, as that phrase is defined under Texas caselaw, the insurance policy did not provide coverage of those acts. As the acts alleged within the "four corners" of McLaren's complaint did not fall within the coverage described within the "four corners" of the insurance policy, Imperial had no duty under the so-called "eight corners" test to defend Taylor against McLaren's suit. All of McLaren's remaining claims were barred by statutes of limitations. For the foregoing reasons, the judgment of the district court is now

AFFIRMED.

U.S. COURT OF APPEALS

FILED JUL 06 1992

GILBERT F. GANUCHEAU, CLERK

**APPENDIX C**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1254

ROBERTA McLAREN,

Plaintiff-Appellant,

versus

IMPERIAL CASUALTY & INDEMNITY COMPANY, ET AL.,

Defendants-Appellees.

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Appeal from the United States
District Court for the
Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 07-06-92, 5 Cir., 199__, _____F.2d _____)

(August 21, 1992)

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/S/ WIENER
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

REHG-6

**APPENDIX D**

IN THE DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

| | | |
|---|---|---|
| ROBERTA McLAREN, | § | |
| | § | |
| Plaintiff, | § | |
| | § | CIVIL ACTION NO. |
| | § | 4-90-460-A |
| VS. | § | |
| | § | |
| IMPERIAL CASUALTY | § | |
| AND INDEMNITY | § | |
| COMPANY, ET AL, | § | |
| | § | |
| Defendants. | § | |

MEMORANDUM OPINION
AND
ORDER

This is a diversity action. Texas substantive law controls. Roberta McLaren ("McLaren") is plaintiff, and Imperial Casualty and Indemnity Company ("Imperial"), Special Risks, Inc., ("Special") and Russell Grace, Inc., ("Grace") are defendants. The matters that are before the court for ruling are (1) Special's motion to dismiss the complaint as to it because of lack of

personal jurisdiction; (2) McLaren's motion for summary judgment; (3) Special's motion for summary judgment; (4) Imperial's motion for summary judgment; and (5) Grace's motion for summary judgment.

The court has concluded that Special's motion to dismiss should be denied, that McLaren's motion for summary judgment should be denied, and that defendants' motions for summary judgment should be granted.

Nature of the Litigation

A rather simple dispute over liability insurance coverage is at the heart of this action. As is so often true in cases of this sort, the simple coverage dispute comes to the court clothed in legal garb woven with a multitude of legal theories designed to

maximize the gain by McLaren from any possible misstep by the insurer and to impose on the non-insurer defendants basically the same liability sought to be imposed on the insurer defendant because of their alleged relationships to the insurance coverage dispute.

The Insurance Coverage:

Imperial, the insurer defendant, issued to Bedford Police Department and City of Bedford, as the "Named Insureds", a liability insurance policy bearing the title "Law Enforcement Professional Liability Insurance" ("policy"). Exhibit "G" to Amended Complaint. Persons and entities who were "Insureds" to whom liability insurance coverage potentially was afforded by the policy were, inter alia, Bedford Police Department, City of Bedford and employees of each. Id. at

page 1.

Imperial promised in the insuring clause of the policy that, subject to other provisions, limitations and exclusions contained in the policy, it would:

> . . . pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of wrongful acts arising out of Law Enforcement activities.

Id. at page 1 (emphasis added). The term "wrongful act", as used in the insuring clause, is defined in the policy to mean:

> WRONGFUL ACT Means only or all of the following: Actual or alleged error, misstatement or misleading statement, omission, neglect or breach of duty by the Insured individual or collectively, while acting or failing to act within the scope of his employment or official duties pertaining to the law enforcement functions of the Insured;

Id at page 2 (emphasis added).

The insuring clause goes on to provide that the coverage of the policy extends, subject to the terms and provisions of the policy, to (a) legal liability of the insured to pay damages because of personal injury or bodily injury and (b) punitive damage, where permitted by law. The terms "Bodily Injury" and "Punitive Damage" are defined in the policy in ways that are not relevant to the court's rulings. The term "Personal Injury" is defined in the policy as follows:

> PERSONAL INJURY Means false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, assault and battery, libel, slander, defamation of character, discrimination, mental anguish, wrongful entry or eviction, violation of property or deprivation of any rights, privileges or immunities

> secured by the Constitution and Laws of the United States of America or the State for which the Named Insured may be held liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress. However, no act shall be deemed to be or result in personal injury unless committed in the regular course of duty by the Insured.[1]

Id. at page 3 (emphasis added).

Thus, the policy language leaves no doubt that its coverage as to a person who is an "Insured" because of his employment by Bedford Police Department or City of Bedford as a law enforcement

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[1]A proper reading of the "Personal Injury" definition probably leads to the conclusion that the coverage applicable to "Personal Injury" extends only to the "Named Insured." However, for the purpose of this memorandum opinion, the court is assuming, arguendo, that the "Personal Injury" part of the coverage extends, subject to the terms and provisions of the policy, to each person who qualifies as an "Insured" under the policy.

officer extends only to an obligation he has to pay damages that has resulted from an act or omission he has committed "while acting or failing to act within the scope of his employment or official duties pertaining to law enforcement functions" arising out of law enforcement activities. The policy language makes perfectly clear that its coverage does not extend to liability for damages if the liability is the product of a personal lark or venture of the insured that occurred during his deviation for a personal reason from the performance of his law enforcement duties.

Another obligation undertaken by Imperial under the policy was to defend any claim or suit brought against an insured "seeking damages on account of such wrongful acts." Id. at page 1. The

use of the term "such wrongful acts" obviously has reference to the "wrongful acts arising out of Law Enforcement activities" that are mentioned in the insuring clause. So, when the definition of "wrongful acts" is taken into account, the policy says that the insurer's defense obligation exists only when the claims or suit against the insured are the result of an act or omission by the insured "while acting or failing to act within the scope of his employment or official duties" arising out of law enforcement activities.

The policy language that is determinative of this case is clear and unambiguous and would be understood by any reasonably intelligent person.

Facts upon which the Claim of Insurance Coverage is Based:

The core of McLaren's complaint, as amended, is a claim that a police officer of City of Bedford by the name of Larry Taylor ("Taylor") was an insured under the policy and that the policy extended liability insurance protection to Taylor in respect to claims McLaren had against him because of a sexual assault Taylor inflicted on her in April 1985. McLaren incorporates in her complaint the contents of a written statement she made shortly after the event, in which she gives explicit details of her encounter with Taylor. Amended Complaint, page 2 and Exhibit "A." An abbreviated, less lurid account follows:

After an evening of entertainment on April 22, 1985, with friends, and as she was driving on a freeway in Bedford, Texas, McLaren was stopped by Taylor, a

Bedford police officer. At the direction of Taylor, she exited her car, displayed her driver's license and underwent a sobriety test, which, apparently, she passed. Upon discovering that McLaren did not have proof of liability insurance with her, Taylor gave her a ticket for no liability insurance. Taylor then told McLaren to get in her car and follow him, without further explanation. She followed him off the freeway to a deserted area, where Taylor pulled into a parking lot near industrial buildings. Taylor told McLaren to exit her car and enter his. As she was in the process of doing so, Taylor told her to step back as another car went by, and then he told her to come on around and get in his car. She inquired as to whether she should get in the front or back, and followed his

directions when he told her to enter the front. After she was in the front seat Taylor told her to pull her dress up. She pulled it all the way up like he told her to. Then, he told her to unhook her bra and raise it up, which she did. Taylor then stared at her and made complimentary comments about her endowments, at which point the thought passed her mind that Taylor's conduct seemed crude. Next, Taylor unzipped his pants and proceeded to force Taylor [sic] to perform an oral sex act on him. Once the act was completed and McLaren straightened out her dress, Taylor altered the traffic ticket and told her that he was going to give her a citation for no driver's license and that she would be able to take it to the judge a with her driver's license and have it

dismissed. When she inquired as to whether she could leave, Taylor told her that she could. She went to her car. Taylor told her to stand by her car until he lad left.

Taylor's conduct led to a criminal indictment and his conviction on the offense of sexual assault.

The State Court Suit and Events Related to it:

In the process of attempting to parlay the unfortunate event she describes in her complaint into a joint and several recovery from defendants of approximately $25,000,000.00, McLaren, in cooperation with Taylor, has employed techniques that have become all too familiar in the legal community.

The first overt act was the giving by Taylor of notice to Imperial, Special

and Grace of the existence of McLaren's claims against him. McLaren fortified the notice by giving a notice of her own, which told of her intent to file suit against Taylor if her claims were not resolved. When Imperial, quite understandably in view of the policy language, did not accede to the demands that it make payment to McLaren on behalf of Taylor, McLaren filed a damage suit against City of Bedford and Taylor in a state district court.[2] The damage suit pleading revealed on its face that the claims by McLaren against Taylor arose from personal conduct on the part of Taylor, unrelated to any law enforcement goal. Basically, the pleading gave a

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[2]After the suit was filed McLaren reached a settlement with City of Bedford and caused it to be dismissed from the suit, leaving Taylor as the sole defendant.

short version of the April 1985 encounter between McLaren and Taylor that is described in the written statement mentioned above. The pleading made clear that McLaren's causes of action against Taylor were based on the encounter thus described, and went on to complain that Taylor's restraint of McLaren was "devoid of any lawful justification whatsoever." Exhibit "C" to Amended Complaint, pages 1-2.

Taylor made demand on Imperial to assume his defense in the damage suit. Imperial declined. That left McLaren and Taylor to their own devices in the handling of the state court litigation. The next prop in the scenario was the taking by McLaren in June 1989 of something in the nature of a default judgment against Taylor in the damage

suit for $7,018,045.00 (actual damages of $2,000,000.00, punitive damages of $5,000,000.00 and attorney's fees of $18,045.00), plus interest on $2,000,000.00 at the rate of ten percent per annum, compounded annually, from April 25, 1985, plus interest on the full amount of the judgment at the rate of ten percent per annum, compounded annually, from date of judgment until paid.[3] Presumably after the judge presiding over the damage suit had been persuaded to sign the judgment, Taylor assigned to McLaren "any and all cause (sic) of action that he had against the insurance company and/or companies, their agents,

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[3]The judgment recites that Taylor "wholly failed to appear for trial, and the plaintiff waived a jury trial, and tried to the Court her case against the defendant Mr. Taylor." Exhibit "F" to Amended Complaint.

or employees who either insured, adjusted, represented or misrepresented and/or failed to properly adjust and/or defend him for liability during the time he was a police officer for the City of Bedford. . . ." Plaintiff's Amended Complaint, page 4.

McLaren's Claims Before this Court:

The instant action was brought by McLaren as assignee of Taylor. Not only does McLaren seek to recover the amount of the damage suit judgment, she asks for recovery of treble that amount plus attorney's fees she will incur in the prosecution of this action. She complains in her amended complaint of Imperial's failure to pay her claims against Taylor and its failure to defend her suit against Taylor. Liability is sought to be imposed on Grace because of

its participation in causing the policy to be issued. Her complaint against Special arises from a role it had in adjusting her claims against Taylor.

All the alleged wrongs about which McLaren complains in this action are said by her to have been committed against Taylor. She seeks to recover as Taylor's assignee what she alleges he could have recovered if he had not assigned his claims to her.

Summary Disposition is Appropriate in this Action

This action is particularly suited for summary disposition under the rules and standards expressed by the Supreme Court in Matsushita Electric Industrial Co. v. Zenith Radio Corp, 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); and, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Once

the blunderbuss allegations of McLaren's amended complaint are carefully scrutinized, and the chaff is brushed aside, her claims are seen to be totally without merit. For the most part, the lack of merit is affirmatively demonstrated by McLaren's amended complaint and the exhibits accompanying it. Other of her claims are proved unmeritorious by affidavits and other parts of the summary judgment record. The rest of her claims fall by the wayside because of her failure to come forward with summary judgment evidence after the existence of evidence to support the claims was challenged by one or more of defendants' motions. See International Ass'n of Machinists & Aerospace Workers v. Intercontinental Manufacturing Co., 812 F.2d 219, 222 (5th

Cir. 1986).

The Policy Does Not Provide Coverage to Taylor for Claims Resulting from his Encounter with McLaren

Bearing in mind the policy definition of "wrongful acts", the fact of non-coverage is self-evident from the policy language. McLaren's claims against Taylor do not in any shape, form or fashion arise from any act or omission on the part of Taylor within the scope of his employment or official duties pertaining to law enforcement functions arising out of law enforcement activities.

The ultimate issue in City of Green Cove Springs v. Donaldson, 348 F.2d 197 (5th Cir. 1965), was whether a sexual assault committed by a police officer during his duty hours on a person he had detained in the course of his police work

was committed within the scope of his employment. A related question was whether the scope of employment issue should have been submitted to the jury. Each of these questions was answered in the negative. The Fifth Circuit held that the facts, construed most favorably to the plaintiff, would admit of no inference "other than that in his rape of the plaintiff, Officer Moseley stepped aside from his employment to accomplish his own, rather than the City's purpose." 348 F.2d at 203.

The same result was reached in Mary M. v. City of Los Angeles, 266 Cal. Rptr. 487 (Cal. Ct. App. 1988). In that case Mary M. had been raped by a Los Angeles police officer during his working hours. The court held as a matter of law that the officer's rape of Mary M. "did not

take place within the scope of his employment." 266 Cal. Rptr. at 499.

Principles of law adopted by Texas courts governing the master and servant relationship would cause a Texas court to reach the same results that were reached by the Fifth Circuit and the California court. In Smith v. M. System Food Stores, 156 Tex. 484, 297 S.W.2d 112 (1957), the Texas Supreme Court held that as a matter of law a police officer was not acting within the scope of his employment when he assaulted an acquaintance of a woman he had detained for shoplifting. The Texas test for scope of employment in the context of the facts presented in Smith was expressed by the court as follows:

> To be within the scope of employment "the conduct must be of the same general nature as that authorized or incidental

> to the conduct authorized." Restatement of the Law of Agency, Sec. 229. In Home Telephone & Electric Co. v. Branton, Tex. Civ. App., 7 S.W.2d 627-629, in an opinion by our present Chief Justice, then on the Court of Civil Appeals, the rule was said to be that: "* * * where the act of the servant is not in the furtherance of the master's business, or for the accomplishment of the object for which he was employed, but is performed as a resentment of insults, or in the furtherance of personal animosities of the servant, the master is not liable."

297 S.W.2d at 114. See also, Rosales v. American Buslines, Inc., 598 S.W.2d 706 (Tex. Civ. App. - El Paso 1980, writ ref'd n.r.e.); Gifford-Hill & Co. Inc., v. Moore, 479 S.W.2d 711 (Tex. Civ. App. - Tyler 1972, no writ); and Sheffield v. Central Freight Lines, Inc., 435 S.W.2d 954 (Tex. Civ. App. - Dallas 1968, no writ).

Applying the principles of Smith to

the instant action, the acts of Taylor about which McLaren complains were not within the scope of his employment because they were not in the furtherance of the business of City of Bedford or for the accomplishment of the object for which he was employed, but, instead, they were committed in the furtherance and gratification of personal desires and impulses of Taylor. From those conclusions there naturally follows the conclusion that the illegal Taylor-McLaren encounter was not an act or failure to act on the part of Taylor "within the scope of his employment or official duties pertaining to the law enforcement functions of the Insured" arising out of law enforcement activities. Therefore, the coverage of the policy does not extend to Taylor as

to claims arising from the encounter.

In an affidavit McLaren filed with her responses to the defendants' motions, she puts emphasis on the circumstances that Taylor was equipped with a large pistol and was in a marked police car, that she assumed that she was being arrested when Taylor told her to follow him, that Taylor put his hand on his revolver after she entered his vehicle, that the lights and police radio remained on while she was in the car, and the like. If the point of the affidavit is to prove that the assault was within Taylor's apparent duties as a police officer, it not only is absurd, but it has missed the point. The policy coverage does not extend to conduct an injured party might perceive to be within the scope of the officer's duties unless

the conduct is, in fact, as it is perceived to be. In other words, the coverage relates to scope of employment and not apparent scope of employment.

McLaren places emphasis in her summary judgment papers on risks that are include in the "Personal Injury" definition in the policy. This fails to take into account that the question of coverage, vel non, for "Personal Injury" is not reached if the activity of which complaint is made is not, as it is required by the insuring clause, a "wrongful act[s] arising out of Law Enforcement activity." Moreover, even if the "wrongful act" hurdle could be overcome by McLaren, she still would be faced with the last sentence of the "Personal Injury" policy definition, which says that "no act shall be deemed

to be or result in personal injury unless committed in the regular course of duty by the insured." For all the reasons previously given, the conduct of Taylor about which McLaren has complained clearly was not committed in the regular course of his duty as a law enforcement officer.

Next, McLaren contends that defendants are prohibited from questioning existence of scope of employment at the time of the encounter because, she argues, the award of attorney's fees made to her in the June 1989 damage suit judgment was made pursuant to 42 U.S.C. §§ 1983 and 1988, which means, according to her reasoning, that the state district court adjudged that Taylor was acting under color of state law at the time of the encounter

and, therefore, was acting within the course of his employment. The court does not need to evaluate the correctness of McLaren's argument as to the kind of adjudication the state court made in connection with the award of attorney's fees[4] because the defendants in this action would not in any event be bound by any state court adjudication against Taylor of issues pertinent to coverage under the policy.

A holding of the Texas Supreme Court in Employers Casualty Co. v. Block, 744 S.W.2d 940 (Tex. 1988), was that a liability insurer that has not participated in the defense of a damage suit brought against its insured is not

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[4]"Under color of state law" does not necessarily equate to "scope of employment." See Brown v. Miller, 631 F.2d 408, 411 (5th Cir. 1980).

bound by adjudications in the damage suit judgment on issues that determine coverage. As does Imperial in the instant case, the insurer in Block asserted non-liability to its insured as to a damage suit judgment because of policy provisions that caused it not to have coverage. The insured and the damage suit plaintiff contended that res judicata and collateral estoppel resulting from the damage suit judgment prevented Employers Casualty from litigating coverage facts in a later suit brought against the insurer for recovery of the amount of the judgment.

In Block, the Texas Supreme Court expressed approval of the 1978 Texas Court of Appeals decision in Hargis v. Maryland American General Insurance Co., 567 S.W.2d 923 (Tex. Civ. App. - Eastland

1978, writ ref'd n.r.e.), which held that the questions of liability of the insured and of coverage are separate and distinct, and that a prior judgment establishing liability against the insured is not binding on the insurer as to the issue of coverage. The Supreme Court noted that in Hargis the Court of Civil Appeals was dealing with a judgment resulting from litigation, but said that "[i]t is apparent that the reasoning of the court applies as much, if not more, to agreed judgments." 744 S.W.2d at 943. In the course of holding that Employers Casualty was not bound by adjudications made in the damage suit judgment, the court said in Block that:

> Likewise, in light of the fact that the respective positions of CSI [the insured] and Employers Casualty regarding coverage were in conflict, no privity existed between the

> parties, thus precluding the application of the collateral estoppel doctrine. See Restatement (Second) of Judgments § 58(a) (1982). Therefore, we conclude that Employers Casualty should not be precluded from litigating the issue of coverage in the present case.

744 S.W.2d at 943. For the same reasons, none of the adjudications pertinent to coverage that are expressed or implied in the damage suit judgment against Taylor are binding on the defendants in this action.

McLaren's Arguments that the Policy Imposed a Defense Obligation even Though the Claims Did Not Arise from "Wrongful Acts"

In her response to defendants' motions for summary judgment, and as the ground for her own motion, McLaren argues that under Texas law Imperial had a duty to defend the damage suit because of the allegations she made in the damage suit

petition. According to her, the duty to defend would exist despite conclusive proof that the policy did not provide coverage.

The so-called "allegations of the complaint" rule is generally stated to be that the existence of the defense duty depends upon the allegation of the underlying complaint against the insured without regard to the true facts. A careful analysis of the Texas cases discloses that if the rule were to be applied to this case it would operate in favor of defendants but that, in fact, it should play no role in a coverage dispute of this kind.

The rule is limited in the reported cases to two kinds of situations. One is where the insurance company seeks to avoid the defense obligation on the

ground that extrinsic facts establish that the insured is not liable in the underlying suit. In that situation, the courts hold that the insurer must defend anyway. It cannot avoid defense merely because extrinsic facts show non-liability of its insured. The policy itself says it must defend even if the allegations are groundless, false or fraudulent. The leading case is Heyden Newport Chemical Corp. v. Southern General Insurance Co., 387 S.W.2d 22 (Tex. 1965), in which the underlying damage claim against the insured was based on allegations that the actual wrongdoer, whose negligence was alleged to have caused the damage, was the agent of the insured. The insurance company denied coverage on the ground that the true facts show that, despite the

allegations, the negligent wrongdoer was not the agent to the insured and that consequently the insured was not liable. This was the context in which the Supreme Court held that allegations of the petition were controlling and that the insurance company owed a defense. The company did not even assert a policy exclusion or other coverage defense.

The second situation in which the rule has been applied is where the underlying complaint affirmatively alleges a set of facts that fall within an exclusion to the policy coverage or are otherwise outside of the coverage. The insurer need not defend because the policy, as in the present case, requires the company to defend only those suits "seeking" damages that are payable under the policy. For example, in Argonaut

Southwest Insurance Company v. Maupin, 500 S.W.2d 633 (Tex. 1973), the underlying complaint was construed by the court to allege an intentional act. The court held the company was not obligated to defend because the complaint on its face alleged conduct that was outside the coverage of the policy.

An illustration of both kinds of situations is seen in Maryland Casualty Co. v. Moritz, 138 S.W.2d 1095 (Tex. Civ. App. - Austin 1940, writ ref'd), in which the court heavily relied in the Heyden case. In Moritz, Klein, the insured's truck driver, had exchanged that truck for one owned and driven by one Neilson before the accident that gave rise to the underlying claim. Thus, Klein was driving Neilson's truck, Neilson was driving the insured's truck, and both

proceeded along, one behind the other, until the Neilson truck being driven by Klein collided with a third vehicle, killing its occupant. The insurance company refused to defend the insured. He successfully defended and than sued for cost of defense.

The court observed that if the allegations in the underlying death action had been limited to stating a cause of action for Klein's negligence in operating the Neilson truck, the insurance company would have been correct in its refusal to defend because the underlying petition would have affirmatively showed that the Neilson truck being operated by Klein was not covered by the policy. However, the court explained that the petition further alleged that Klein had retained control

of the insured's truck, even though he was not driving it, and that, in the course of that agency for the insured, his negligence also contributed to the accident. Since the allegations concerning his control and negligence related to liability, not coverage, the company owed a defense obligation.

The pleading by which the damage suit in the instant case was filed and prosecuted made the following allegations:

> Plaintiff Roberta E. McLaren drove her car east along Airport Freeway and into the City of Bedford, Texas, the late evening of April 22nd or the early morning of April 23rd, 1985. There, in Bedford, Ms. McLaren was stopped by a man, a police officer of the City of Bedford, Defendant Larry W. Taylor. He asked, in apparent performance of police functions and under color of his office, that she step from her car and submit to a quite short field sobriety test.

> Still in apparent performance of police functions and under color of his office, Officer Taylor then instructed Ms. McLaren to take her car, and follow closely behind his police car. He led her to a parking lot, dark and deserted and off the highway, and still in apparent performance of police functions and under color of his office, Officer Taylor instructed her this time to leave her car and get into the front seat of the police car.
>
> There, armed, Officer Taylor lifted Ms. McLaren's dress, demanded that she unclasp and remove her bra, exposed his sexual organ and grabbing hold of the back of her head, forced his sexual organ into Roberta McLaren's mouth, and in her mouth and on her face, ejaculated.

Then, Officer Taylor released her. Exhibit "C" to First Amended Complaint, pages 1-2. The damage suit petition went on to allege that Taylor's restraint of McLaren was devoid of any lawful justification whatsoever." Id. at page

2. These allegations state facts that affirmatively establish non-coverage because the only reasonable conclusion that can be reached from the allegations is that the liability sought to be imposed on Taylor is not on account of "wrongful acts arising out of Law Enforcement activities", as those words are used in the insuring clause of the policy. Conclusory "scope of employment," or the like, allegations cannot prevail over the precise factual allegations that show positively that McLaren's claims arise from a purely personal venture of Taylor. Therefore, if the "allegations of the complaint" rule were to be given effect in this action, it would apply in favor of the defendants.

Moreover, there appears to be a more

general rule that the true facts always can be used to establish non-existence of a defense obligation, no matter what the plaintiff might allege in her damage suit complaint. In Gonzalez v. American State Insurance Co. of Texas, the court explained:

> Where the insurance company refuses to defend its insured on the ground that the insured is not liable to the claimant, the allegations in the claimant's petition control, and facts extrinsic to those alleged in the petition may not be used to controvert those allegations. But, where the basis for the refusal to defend is that the events giving rise to the suit are outside the coverage of the insurance policy, facts extrinsic to the claimants petition may be used to determine whether a duty to defend exists.

628 S.W.2d 184, 187 (Tex. App. - Corpus Christi 1982, no writ) (discussing Fort Worth Lloyds v. Garza, 527 S.W.2d 195 (Tex. Civ. App. - Corpus Christi 1975,

writ ref'd n.r.e.); International Service Insurance Co. v. Boll, 392 S.W.2d 158 (Tex. Civ. App. - Houston 1965, writ ref'd n.r.e.); and Cook v. Ohio Casualty Insurance Company, 418 S.W.2d 712 (Tex. Civ. App. - Texarkana 1967, no writ)). Another case so holding is Massachusetts Bonding and Insurance Co. v. Roessler, 112 S.W.2d 275 (Tex. Civ. App. - Fort Worth 1937, writ dismissed). See also Blue Ridge Insurance Co. v. Hanover Insurance Co., 748 F. Supp. 470 (N.D. Tex. 1990).

As the court noted in Hagen Supply Corp. v. Iowa National Mutual Insurance Co., 331 F.2d 199 (8th Cir. 1964), the "allegations of the complaint" rule simply does not apply when the issue to be decided is whether there is coverage, as distinguished from whether there is

liability on the part of the insured. The court explained:

> The general rule is that an insurance company under a provision requiring it to defend an action, even if it is groundless, false or fraudulent, is under no duty to defend a claim which is outside the coverage provided by the policy.

331 F.2d at 203-04. While the court decisions are not uniform on the subject under discussion, they generally support the rule expressed by the Texas court in Gonzales and the Eighth circuit in Hagen Supply Corp.[5]

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[5]A collection of cases on this subject, and the subject of damages recoverable for breach of duty to defend, is found in an annotation at 49 A.L.R.2d 694, entitled "Consequences of liability insurer's refusal to assume defense of action against insurer upon ground that claim upon which action is based is not within coverage of policy." Court decisions in point to the issues under discussion are in § 5 of the later case service pertaining to the annotation.

Under this rule, even if McLaren's damage suit pleading could be read to allege facts that, if true, would cause coverage to exist, Imperial nevertheless would not have a duty to defend the suit because the facts alleged would be false. As previously noted in this opinion, the defense feature of the policy expressly states that the duty to defend is applicable only to claims or suits against the insurer seeking damages on account of "such wrongful acts." The policy language that defines the duty to defend is as follows:

> [T]he Company shall have the right and duty to defend any claim or suit against the Insured seeking damages on account of such wrongful acts, even if the allegations of the claim or suit are groundless,

> false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient.

Exhibit "G" to Amended Complaint (emphasis added).

The words that are dispositive of the matter under discussion are "seeking damages on account of such wrongful acts."[6] There is no reasonable interpretation that can be given to this policy language other than that the duty to defend exists only if the claim or suit against the insured is one "seeking damages on account of such wrongful acts." Consequently, no matter what the allegations of the damage suit pleading

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[6]There are variations of defense clause language in insurance policies. Any version that conditions duty to defend on the existence of claims and suits seeking damages on account of the insuring clause coverage would have the same effect as the language in question.

might have been, Imperial did not have a defense obligation unless, in fact, the acts upon which the claim against Taylor were asserted were ones "seeking damages on account" of "wrongful acts arising out of Law Enforcement activities." The "even if the allegations of the claim or suit are groundless, false or fraudulent" part of the defense clause is not even reached for consideration if the condition precedent to the duty to defend ("suit against the insured seeking damages on account of such wrongful acts") had not been satisfied. The "groundless, false or fraudulent" language refers to the integrity of liability allegations against an insured and not to the quality of allegations in a damage suit pleading of facts that bear on whether there is coverage that would

cause the insurance company to have a duty of defense.

A holding that extrinsic evidence of non-coverage may be used to refute the obligation to indemnify, but may not be used to refute the obligation to defend, when, under the language of the policy, neither obligation arises unless there has been a "wrongful act[s] arising out of Law Enforcement activities," would make no sense. The wording of the defense obligation contained in the policy leaves no doubt that the intent of the policy is that a defense obligation exists only when there will be a payment obligation for a judgment that might be rendered in the damage suit.

Imperial had no duty to defend the claims or suit by McLaren against Taylor. Therefore, no liability can be imposed on

any of the defendants because of Imperial's failure to defend.

Another Reason why Summary Judgment is Appropriate as to the "Duty to Defend" Claims

Another reason why the failure to defend theory cannot survive a defense motion for summary judgment, or support McLaren's, is that there is no summary judgment evidence that Taylor was damaged by the failure. There is nothing in the record to indicate that Taylor incurred any legal or other expense or suffered other compensable damage because of Imperial's declination to defend. Even if one assumes the existence of a duty to defend, there still would not be a duty to pay the amount of the damage suit judgment because the events giving rise to the judgment are outside the scope of Imperial's promise to pay, as contained

in the insuring clause. When an insurer's only breach is of a duty to defend, and there is no payment obligation under the policy, the insurer obviously would not have any obligation to settle or pay the claim against its insured. Its sole obligation would be to provide a defense to the insured, and the sole remedy of the insured for breach of the defense duty would be to recover damages, such as legal expenses incurred by the insured in providing his own defense, suffered by the insured because of the insurer's breach of its promise to defend.

A case of pure breach of duty to defend, which does not at the same time involve the breach of a promise to pay or settlement present quite a different situation from those dealt within the

cases such as Blakeley v. American Employers' Insurance Co., 424 F.2d 728 (5th Cir. 1970), and Employers National Insurance Co. v. Zurich American Insurance Co., 792 F.2d 517 (5th Cir. 1986). If the duty to defend is the only one breached, the damages recoverable for the breach ordinarily will correspondingly be limited. The arguments and authorities presented by McLaren on this subject are a mismatch of failure to pay, failure to settle and failure to defend concepts and results. McLaren's Motion for Summary Judgment, pages 10-13. Each of those failures has separate and distinct consequences, though, as McLaren has done, some of the court decisions have mixed and blended them in a confusing and improper way.

This discussion relative to damages

is somewhat academic because there seldom would be a duty to defend if there is no coverage, i.e., no duty to pay. Nevertheless, the absence of evidence of damages would provide a ground for summary judgment on the duty to defend theory even if there had been breach of duty to defend in this case.

McLaren's Contentions Related to Non-Approval by the State Board of the Policy Form

McLaren alleges that the policy is of a kind that required approval of the State Board of Insurance of Texas; that it was not approved; that Texas law holds that a company wrongfully failing to submit its insurance policies for approval is estopped from claiming that the policies are void when a claim is made against them; but, that, nevertheless, any exclusionary language

in the policies is null and void and cannot be used to defeat the claim of an insured under the policy. Amended Complaint, pages 12-13. At another point in her complaint, as amended, McLaren alleges that the failure to have the policy approved by the State Board estops defendants from denying coverage or from claiming any exclusion in or defense to the policy. Id. at 15. Other allegations make non-specific complaints against each of the defendants in reference to non-approval of the policy form. Id. at 16-18.

The summary judgment record does have evidence that the form of the policy was not approved by the State Board. Except for motor vehicle insurance policies, there is no standard or uniform policy form required in Texas for use in

writing casualty or liability insurance. Tex. Ins. Code Ann. art 5.06 & 5.15 (Vernon 1981 & Supp. 1991). Travelers Insurance Co. v. Chicago Bridge & Iron Co., 442 S.W.2d 888, 893 (Tex. Civ. App. - Houston [1st Dist.] 1969, writ ref'd n.r.e.). The filing of forms and rates for casualty insurers, including law enforcement professional liability insurers, is governed by article 5.15 of the Insurance Code, which is entitled "Filing of Rates and Rating Information; Approval." Article 5.15 speaks not to filing or approval of forms but to rates and "rating information." In Chicago Bridge & Iron Co., the court observed that the primary purpose of the Legislature was not the approval of policy forms but approval of premium to be charged. 442 S.W.2d at 894. In that

case, the Texas court enforced the policy (endorsement) language in its entirety notwithstanding its non-approval. The court noted that "it should not follow that no insurance is provided to the insured by reason of the insurer's violation of the law." Id. at 894.

Chicago Bridge & Iron Co. does not, as McLaren suggests in her summary judgment papers, hold that exclusions in a non-approved policy form of this kind cannot be enforced by the insurer. Its holding is just the opposite. Obviously, when an insured seeks to enforce a policy such as this, as Taylor, through Mclaren, is seeking to do in this case, the insured cannot select the good and discard the bad. Instead, he must take or leave the policy in its entirety. In this instance, McLaren, as Taylor's

assignee, has chosen to take it, and she has taken it with all of its terms and provisions.

Futhermore, the policy language that causes McLaren not to have a cause of acton under the policy is not an exclusion but, rather, is an essential part of the insuring obligation. The language defines the scope of Imperial's insuring obligation in the first instance rather than to constitute an exclusion from a previously defined insuring obligation. Even if there could be basis for argument that policy exclusions are unenforceable, such an argument would be ill-put in this action.

Finally, on this subject, there is no summary judgment evidence that Taylor suffered any damage or harm by reason of

the non-approval of the policy form.[7] All claims of McLaren based on non-approval are without merit as a matter of law under the summary judgment record.

Other Theories of Recovery Asserted by McLaren

All of McLaren's theories of recovery are predicated on the soundness of one or more of her contention that already have been decided against her in this memorandum opinion. Having disposed of each of those theories adversely to McLaren, the court has effectively ruled against McLaren on the rest of her theories, including her alleged claims of (a) coverage by estoppel, (b) breach of the covenant of good faith and fair

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[7]The court does not need to decide whether Taylor, as a non-party to the contract, would have the right, in any event, to complain of non-approval of the policy form.

dealing, (c) violation of rules and regulations of the Texas State Board of Insurance, (d) failure to inform City of Bedford and Taylor of the financial condition of Imperial, (e) violations of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. §§ 17.41-.63 (Vernon 1987 & Supp. 1991), (f) violations of Tex. Ins. Code Ann. art. 21.21. (Vernon 1981 & supp. 1991), and (g) breach of implied warranty to perform services in a good and workmanlike manner.

As a matter of law none of McLaren's theories of recovery has merit under the summary judgment record in this case.

Considering the Main Thrust of Grace's Motion for Summary Judgment

There is another reason why Grace's motion has merit. The main ground of Grace's motion for summary judgment is

that Grace's contacts with the policy and McLaren's claims against Taylor were insufficient to allow liability to be imposed on Grace even if the court were to conclude that Taylor has insurance coverage for McLaren's claims and that McLaren, through her assignment from Taylor, has causes of action based on the conduct of Imperial in failing to defend Taylor and in failing to pay McLaren's claims against Taylor. The court is of the opinion that this ground is meritorious and provides independent basis for dismissal of McLaren's claims against Grace.

Grace incorporated by reference in its motion for summary judgment an affidavit of Robert W. Grace that had been filed with defendants' notice of removal when this action was removed from

state court. The affidavit, which is substantiated by Mr. Grace's deposition testimony, establishes without contradiction that Grace did not have a relationship to issuance of the policy or handling of the claims of McLaren against Taylor that would support any theory of liability against it. Moreover, there is no summary judgment evidence that any of the things about which McLaren complains as to Grace was a producing cause of any loss or damage suffered by Taylor.

The memorandum opinion and order signed by the court December 13, 1990, expressed the determination made by the court that Grace was fraudulently joined in this action, as it was pleaded by McLaren before removal to this court, for the purpose of attempting to defeat the removal rights of the remaining

defendants. Since then, McLaren has filed her prolix amended complaint in an apparent effort to contrive a dispute that would prevent summary disposition of the action as to Grace, as well as the other defendants. Her amended complaint comes no closer to the mark than did the pleading it replaced.

The "Non-Assignability" Ground Urged by Defendants in their Motions for Summary Judgment

Imperial and Special urge in their respective motions for summary judgment that McLaren has no right of action because the policy prohibited the assignment from Taylor to her upon which she bases her right to bring the action. The policy language to which they refer reads: "H. NON-ASSIGNABLE: The interest of the Insured under this policy shall not be assignable." Exhibit "G" to

Amended Petition, page 3. This ground is without merit. See Maneikis v. St. Paul Insurance Co. of Illinois, 655 F.2d 818, 826 (7th Cir. 1981). No Texas case has been cited by the parties, and none has been found, on this subject; however, the court has no doubt that a Texas court would hold that the policy prohibition against assignment of an interest under the policy is inapplicable to the assignment of causes of action that have come into existence after the loss has occurred.

The Limitations Grounds of the Defense Motions

Each of the defendants relies on limitations as a defense. The court has concluded that, if limitations were the sole ground of the defense motions, summary judgment could not be granted as to the entire case, but that, in such an

assumed event, limitations would be an appropriate ground for summary disposition of all of McLaren's theories of recovery other than her theory that Imperial had an obligation to make payment under the policy and that it, therefore, has a payment obligation as to the state court judgment. The court is not engaging in extensive discussion of the limitations grounds in view of the existence of the other, previously mentioned, clear-cut reasons why defendants' motions should be granted.

However, the court notes that McLaren is in error in the reliance she places on Texas court decisions to the effect that the summary judgment burden is on the defendants to bring forward summary judgment evidence to negate the "discovery rule." McLaren's Response to

Imperial's Motion for Summary Judgment, page 13. The "discovery rule" is a plea in confession and avoidance, and a plaintiff seeking to benefit from the rule has the burden of proof at trial to prove its elements "as it will generally have greater access to the facts necessary to establish that it falls within the rule." Wood v. William M. Mercer, Inc., 769 S.W.2d 515, 517-18 (Tex. 1988).

A rule of Texas summary judgment procedure is that, in order to gain a summary judgment on the ground of limitations, the moving party has the burden to negate the discovery rule by establishing as a matter of law by summary judgment evidence that the plaintiff discovered or should have discovered the facts upon which the

confession and avoidance plea is based far enough in advance of the filing of suit for the applicable limitations period to have elapsed between "discovery" and the filing of suit. Id. at 518, fn. 2; Burns v. Thomas, 786 S.W.2d 266 (Tex. 1990). But, the federal courts are not bound by the state court precedural rules governing summary disposition. Schultz v. Newsweek, Inc., 668 F.2d 911, 917 (6th Cir. 1982); see also Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1036 n.10 (5th Cir. 1982). The rules applicable here are those announced in cases such as Celotex Corp. v. Catrett, 477 U.S. 316 (1986), and International Ass'n of Machinists and Aerospace Workers v. Intercontinental Manufacturing Co., 812 F.2d 219 (5th Cir.

1986). In responding to the gorunds of the defense motions urging limitations as a defense, McLaren had the summary judgment burden to adduce some evidence in support of her "discovery rule" plea of confession and avoidance. She failed to meet her summary judgment burden.

Special's Motion to Dismiss for Want of In Personam Jurisdiction

The court has concluded that Special has had sufficient contacts with the State of Texas to authorize the court to exercise jurisdiction over its person and that such exercise comports with fair play and substantial justice. Special's contacts with the State of Texas have been significant enough that it should have reasonably anticipated being haled into court here. See Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444

U.S. 286 (1980); Schlobahn v. Schapiro, 784 S.W.2d 355 (Tex. 1990).

By contract with Imperial, Special assumed significant functions that normally would be performed by an insurer in relation to the insurance coverage in question. Nusbaum dep., pages 48-50, 64-66, 70, 144-145, Exhibit 3; Mitilier dep., pages 39-41, 47 & 77. Special's assumed name, address and telephone number were printed on the face of the policy under the words "Send all Notices of Occurrences and or Claims Directly to:". Exhibit G to Amended Complaint, page 1. The processing of McLaren's claim against Taylor was handled, at least initially, through Special. Nusbaum dep., page 121. On October 29, 1982, Emanuel Joseph Nusbaum, who was the major shareholder and president and

chairman of the board of Special, became licensed, through sponsorship of Special, by the State Board of Insurance of Texas as a non-resident agent "authorized to act as a Non-Resident Agent in the State of Texas." Nusbaum dep., page 110, Exhibit 7. The license was renewed on October 29, 1984, to remain in effect to October 29, 1986, and it again was renewed on October 29, 1986, to remain in effect to October 29, 1988. Id. The October 29, 1986, renewal showed that the license was to be issued to Mr. Nusbaum d/b/a Special Risks, Inc. Id., Exhibit 7.

ORDER

For the reasons given in the foregoing memorandum opinion, the court ORDERS that:

(1) Special's motion to dismiss for

lack of personal jurisdiction should be, and it is hereby, denied;

(2) McLaren's motion for summary judgment should be, and it is hereby denied;

(3) Imperial's motion for summary judgment should be and is hereby, granted;

(4) Special's motion for summary judgment should be, and it is hereby, granted;

(5) Grace's motion for summary judgment should be, and it is hereby, granted; and

(6) A judgment is to be entered denying McLaren any recovery from Imperial, Special or Grace, and dismissing all of her claims and causes of action against each defendant, with costs of court to be recovered by each

defendant from plaintiff.

SIGNED February 12, 1991.

/S/
JOHN McBRYDE
United States District Judge

## APPENDIX E

IMPERIAL CASUALTY & INDEMNITY COMPANY
A STOCK COMPANY OMAHA, NEBRASKA
LAW ENFORCEMENT PROFESSIONAL
LIABILITY INSURANCE

POLICY NUMBER: 83LE 002728

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The Company will pay on behalf of the Insured all sums which the Insured shall become legally obliged to pay as damages because of the wrongful acts arising out of Law Enforcement activities, as follows:

Coverage A - Personal Injury
Coverage B - Bodily Injury
Coverage C - Property Damage
Coverage D - Punitive Damage
(Where permitted by law)

to which this policy applies and the Company shall have the right and duty to defend any claim or suit against the Insured seeking damages on account of such wrongful acts, even if the allegations of the claim or suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient. However, the Company shall not be obliged to pay any claim or judgment or defend any suit, after the applicable limit of the Company's liability has been exhausted by payment of judgements or settlements.

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DEFINITIONS:

PERSONAL INJURY Means false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, assault and battery, libel, slander, defamation of character, discrimination, mental anguish, wrongful entry or eviction, violation of property or deprivation of any rights, privileges or immunities secured by the Constitution and Laws of the United States of America or the State for which the Named Insured may be held liable to the party injured in any action at law, suit in equity, or other proper proceedings of redress. However, no act shall be deemed to be or result in personal injury unless committed in the regular course of duty by the Insured.

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WRONGFUL ACT means only or all of the following: Actual or alleged error, misstatement or misleading statement, omission, neglect or breach of duty by the Insured individual or collectively, while acting or failing to act within the scope of his employment or official duties pertaining to the law enforcement functions of the Insured;

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DATE 4/1/85